

appeal ought to be allowed, the judgment of the Federal Court set aside and the judgment of the High Court restored and that the respondent ought to pay the costs of the appeal to the Federal Court and of this appeal.

Appeal allowed.

Solicitors: *Clintons; Graham Page & Co.*

PEGANG MINING CO. LTD. v. CHOONG SAM & ORS.

[P.C. (Lord Hodson, Lord Guest, Lord Pearce, Lord Pearson and Lord Diplock) July 1, 1969]

[Privy Council Appeal No. 5 of 1968]

Practice and Procedure — Parties — Substitution — One “who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle the questions involved in the cause or matter” — R.S.C. 1957, O.16 r. 11.

Contract — Contract between three parties — Not discharged — Rights and obligations — Whether can be extinguished by agreement between only two

This was an appeal against the decision of the Federal Court ([1967] 2 M.L.J. 214) allowing the application of the first respondent for leave to substitute his name for that of the appellant then before that court, and to add the second respondents as second appellants. The Federal Court without going into the merits of the appeal itself, held on the facts that the applicant had a legal interest in the appeal and therefore he ought to be given leave to intervene.

The sole question before the board was concerning the substitution of the parties to the appeal which was effected by the interlocutory order of the Federal Court.

Held, dismissing the appeal: (1) where a contract is made between three parties and has not been discharged by performance, none of the rights and obligations which it creates can be extinguished except by agreement between all three parties unless upon the true construction of the contract a particular covenant by one party is collateral to the remainder of the covenants and was intended for the exclusive benefit of one of the other two parties, in which case the rights and obligations under that particular covenant can be extinguished by agreement between the covenantor and the other party for whose exclusive benefit it was intended. With this exception any agreement between two only of the three parties to a contract though it purports to extinguish rights and obligations under the contract is incapable in law of doing so and can have effect only as a covenant not to sue;

(2) one of the principal objects of O. 16 r. 11 is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. To achieve this object calls for a flexibility of approach which makes it undesirable in the present case, in which the facts are unique, to attempt to lay down any proposition which could be applicable to all cases.

Per Curiam: “It has sometimes been said that a party may be added if his legal interests will be affected by the judgment in the action but not if his commercial interests only would be affected.

While their Lordships agree that the mere fact that a person is likely to be better off financially if a case is decided one way rather than another is not a sufficient ground to entitle him to be added as a party, they do not find the dichotomy between ‘legal’ and ‘commercial’ interests helpful. A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?”

Cases referred to:—

(1) *Amon v. Raphael Tuck & Sons Ltd.* [1956] 1 Q.B. 357.

(2) *Byrne v. Brown* (1889), 22 Q.B.D. 657.

(3) *Gurtner v. Circuit* [1968] 2 Q.B. 587.

(4) *Moser v. Marsden* [1892] 1 Ch. 487.

(5) *In re I.G. Farbenindustrie A.G.* [1944] Ch. 41.

PRIVY COUNCIL appeal heard on May 5, 6 & 7, 1969.

J.G. Le Quesne, Q.C. and A.P. Hills for the appellants.

Rt. Hon'ble Sir Dingle Foot, Q.C., R. Ramani and M.P. Solomon for the 1st respondent.

E.F.N. Gratiaen, Q.C. and John A. Baker for the 2nd respondents.

Lord Diplock (delivering the judgment of the Board): In 1931 an agreement relating to tin mining rights in Perak was made between three parties. It is convenient to refer to these parties and their respective successors in title as “the company”, the “sub-lessees” and the “sub-sub-lessee”. The company held mining leases from the State of Perak over four parcels of land. These the company had sub-let to the sub-lessees. The company was dissatisfied with the manner in which the sub-lessees were complying with their obligations to work the mines under the sub-leases, and the contract provided that the sub-lessees should grant sub-sub-leases of these parcels to the sub-sub-lessee who was already mining adjacent parcels of land. The contract further provided that the sub-sub-lessee should mine the parcels of which the company was lessee together with the parcels already being mined by the sub-sub-lessee as a single mine under a comprehensive mining scheme. Clause 4 of this contract contemplated the acquisition by the company of mining leases over other parcels of land in the vicinity of those which formed part of the comprehensive mining scheme.

Many years later the company applied for mining leases over certain parcels of land in the vicinity of those referred to in the agreement of 1931. These applications were approved in 1959 and mining leases over the parcels, hereinafter called “the disputed parcels” were subsequently granted to the company. The sub-sub-lessee claimed that upon the true

construction of clause 4 of the agreement of 1931 the company was obliged to grant sub-leases of the disputed parcels to the sub-lessees and the sub-lessees were obliged in turn to grant sub-sub-leases of the disputed parcels to the sub-sub-lessee. The company refused to comply with a request by the sub-sub-lessee that it should grant to the sub-lessees sub-leases of the disputed parcels. The sub-lessees on the other hand were willing to grant sub-sub-leases of these parcels to the sub-sub-lessee if they were given the necessary sub-leases by the company.

The sub-sub-lessee accordingly in July 1964 brought an action in the High Court against the company and the sub-lessees as defendants for specific performance of the contract and praying *inter alia* for (i) an order that the company execute sub-leases of the disputed parcels to the sub-lessees and (ii) an order that the sub-lessees execute sub-sub-leases of the disputed parcels to the sub-sub-lessee.

The company resisted these claims upon a number of grounds of which one was that upon its true construction the agreement of 1931 did not impose upon the company or upon the sub-lessees the alleged obligations to grant sub-leases and sub-sub-leases respectively of the new parcels. The sub-lessees by their defence admitted the claims of the sub-sub-lessee and at the trial of the action by their counsel supported the argument of the plaintiff the sub-sub-lessee.

Upon the trial of the action Ali J. held that the contract did not bear the construction alleged by the sub-sub-lessee and supported by the sub-lessees, and that it imposed no obligation upon the company to grant sub-leases of the disputed parcels to the sub-lessees or upon the latter to grant sub-sub-leases of the new parcels to the sub-sub-lessee. He dismissed the action and ordered the sub-sub-lessee to pay the costs of the company and of the sub-lessees.

At the time of the action the sub-sub-lessee already held sub-sub-leases of two parcels of land referred to in the agreement of 1931 and adjoining the disputed parcels. In respect of these two parcels she had entered into a contract with the first respondent to this appeal (hereinafter called "the contractor") whereby she granted to the contractor liberty to enter on the land and win the minerals on her behalf. The contractor undertook to work the mines in accordance with the Mining Regulations and to deliver the minerals when won to the sub-sub-lessee for sale. He was to be entitled to 85½% of the proceeds of sale and she to 14½%. This contract was originally for twelve months but by a letter of 27th July 1964 she agreed to renew it for as long as she continued to hold sub-sub-leases of the land to which it related.

By the same letter she further agreed with the contractor to use her best endeavours to obtain from the company and the sub-lessees mining rights over the areas contemplated by the agreement of 1931 and in respect of the lands over which such mining rights were obtained to grant to the contractor the liberty to enter on the lands and win and work the minerals upon the same terms as those contained in the contract relating to the two parcels over which she already held sub-sub-leases.

The rights of the contractor under this provision of the agreement contained in the letter of 27th July 1964 thus depended upon the result of the action brought by the sub-sub-lessee against the company and the sub-lessees. If she succeeded in her claim she would be entitled as sub-sub-lessee to mining rights over the disputed parcels of land which the company had acquired. The contractor would in turn be entitled to enter upon the disputed parcels of land and win the minerals thereon for the sub-lessee and to receive 85½% of the proceeds of sale. If on the other hand she failed in her claim the contractor would have no right to enter on the new parcels at all or to work or win any minerals on them.

One further matter is relevant to the issues which arise on this appeal. On 12th July 1963 shortly before the sub-sub-lessee addressed to the company her request that the company should grant to the sub-lessees sub-leases of the disputed parcels the contractor entered into an agreement with the sub-sub-lessee under which he undertook to be solely responsible for any costs incurred by her in enforcing her rights under the agreement of 1931, by arbitration or litigation and she agreed that the final decision whether or not to appeal against any order of the court arising out of such arbitration or litigation should rest with the contractor.

The sub-sub-lessee on 6th January 1967 duly gave notice of appeal to the Federal Court of Malaysia against the judgment of Mr. Justice Ali. To this appeal the company and the sub-lessees were respondents. On 15th March 1967, however, in breach of her agreement with the contractor of 12th July 1963 and contrary to his express instructions she entered into an agreement with the company whereby in consideration of the sum of \$10,000 "as an *ex gratia* payment in full settlement of all her claims against the company" she undertook to withdraw her appeal "and not to prosecute the said matter against the company either in this or any other proceedings". By a further clause of this agreement it was provided: "The (sub-sub-lessee) hereby agrees . . . that all liabilities of the company in respect of the prayers in [in action under appeal] to [the sub-sub-

lessee] are hereby fully and completely discharged."

On 24th March 1967 the sub-sub-lessee gave notice discontinuing her appeal against the company and the sub-lessees as respondents.

On 31st March 1967 the contractor, who was not of course a party to the action or the appeal, gave notice of motion to the Federal Court for an order that either he or the sub-lessees be substituted for the sub-sub-lessee as appellant in the appeal and that the sub-sub-lessee be added as a respondent. The motion came on for hearing before the Federal Court (Barakbah L.P., Azmi C.J. and Ong Hock Thye F.J.) who on 17th July 1967 by a majority (Azmi C.J. dissenting) ordered that the contractor and the sub-lessees be substituted for the sub-sub-lessee as appellants and the sub-sub-lessee be added as a respondent. Leave to appeal to His Majesty the Yang di-Pertuan Agong from this order of 17th July 1967 was granted to the company by the Federal Court on 8th January 1968.

In this appeal brought pursuant to such leave no question arises as to the correctness or otherwise of the judgment of Ali J. in the original action. Their Lordships are concerned solely with the substitution of parties to the appeal in that action which was effected by the interlocutory order of the Federal Court of 17th July 1967.

That part of the order which makes the sub-lessees appellants instead of respondents and the sub-sub-lessee a respondent instead of the appellant can, in their Lordships' view, be dealt with briefly. It is not contended on behalf of the company that the Federal Court lacked jurisdiction to make this part of the order. What is said is that they ought in the exercise of their discretion to have refused to do so.

In their Lordships' view there is no substance in this. The sub-lessees as parties to the agreement of 1931 were necessary parties to any action brought to enforce it. They were content to be joined as defendants and as such to admit and support the claim of the sub-sub-lessee as plaintiff which included a prayer for an order that the company execute sub-leases of the disputed parcels to the sub-lessees. It is conceded by counsel for the company that the sub-lessees notwithstanding that the action against them was dismissed would have been entitled to appeal against it at any rate in so far as it refused to order the company to execute sub-leases of the disputed parcels to the sub-lessees. The sub-lessees did not in fact give notice of appeal from the judgment within the time limited by the Rules of the Federal Court. So far as concerns the sub-lessees the practical effect of the order appealed against is the same

A as if an order had been made extending their time to give notice of appeal. Their interest in the outcome of the appeal as it had been in the original action was the same as that of the sub-sub-lessee and so long as the sub-sub-lessee was prepared to proceed with it as appellant the interests of the estate of which they were executors were sufficiently protected and there was no reason why they should incur the costs of becoming an appellant. When the company clandestinely bought off the sub-sub-lessee in the circumstances on which Ong Hock Thye F.J. justifiably animadverts in his judgment, the interests of the estate which it was the sub-lessees' duty to promote lost that protection. It does not, in their Lordships' view, lie in the mouth of the company who themselves brought this change in the sub-lessees' position after their time for appeal had expired, to object to their now being allowed to appeal against the judgment, and to take part in the appeal as appellants.

The sub-sub-lessee, though she no longer wishes to be an appellant, is a party to the agreement of 1931 sought to be enforced in the appeal. She is a necessary party to the appeal and was properly added as a respondent.

E As respects that part of the Federal Court's order which added the contractor as an appellant, however, it has been strenuously argued on behalf of the company that the Federal Court had no jurisdiction to order this.

F The first ground upon which this submission was based was that the agreement between the company and the sub-sub-lessee of 15th March 1967 operated to discharge and extinguish all the rights of the sub-sub-lessee against the company under the agreement of 1931. Any interest which the contractor had in the subject matter of the litigation was dependent upon the sub-sub-lessee's rights under that agreement. If she had none then the contractor could have no interest in the subject matter of the appeal.

G In their Lordships' opinion this ground is fallacious. Where a contract is made between three parties and has not been discharged by performance, none of the rights and obligations which it creates can be extinguished except by agreement between all three parties unless upon the true construction of the contract a particular covenant by one party is collateral to the remainder of the covenants and was intended for the exclusive benefit of one of the other two parties, in which case the rights and obligations under that particular covenant can be extinguished by agreement between the covenantor and the other party for whose exclusive benefit it was intended. With this exception any agreement between two only of the three parties to a contract though it purports to

extinguish rights and obligations under the contract is incapable in law of doing so and can have effect only as a covenant not to sue.

The covenant alleged to be implied by clause 4 of the agreement of 1931 which the sub-sub-lessee was seeking to enforce in the action does not fall within the exception to this rule. It was a covenant by the company to grant sub-leases of the disputed parcels not to the sub-sub-lessee herself but to the other party to the contract, the sub-lessees coupled with a covenant by the sub-lessees to grant sub-sub-leases of those parcels to the sub-sub-lessee. The company's covenant to grant sub-leases to the sub-lessees was no doubt intended for the benefit of the sub-sub-lessee as well as the sub-lessees for unless it were performed the sub-sub-lessee would not be able to obtain sub-sub-leases from the sub-lease, but in their Lordships' view it is clear beyond argument that the obligation of the company to grant sub-leases to the sub-lessees could not be extinguished by any agreement to which the sub-lessees were not a party.

As respects the obligation of the sub-lessees to grant sub-sub-leases of the disputed parcels to the sub-sub-lessee, the sub-lessees are willing to perform this if they obtain the necessary sub-leases from the company. It cannot be suggested that this obligation has been extinguished.

If the appeal succeeds therefore the result will be that the company will be compelled to execute sub-leases of the disputed parcels to the sub-lessees, and the sub-lessees will be compelled to accept such sub-leases and to execute sub-sub-leases of the disputed parcels to the sub-sub-lessee. It is unnecessary for their Lordships to express any view as to whether or not under the terms of the agreement of 1931 itself the sub-sub-lessee would be obliged to accept the grant of sub-sub-leases by the sub-lessees. To do so would involve consideration of the true construction of that agreement which is the matter in issue in the substantive appeal in the action and this is not before their Lordships. But whatever the obligation of the sub-sub-lessee in this regard under the agreement of 1931 itself, she covenanted with the contractor by the letter of 27th July 1964 to use her best endeavours to obtain such sub-sub-leases and could be compelled by him to accept a grant of sub-sub-leases from the sub-lessees if the latter were willing or ordered to execute them. Once the sub-sub-leases were granted the contractor would be entitled under the agreement contained in the letter of 27th July 1964 to enter upon the disputed parcels and win the minerals thereon.

It is nevertheless submitted on behalf of the company as an alternative ground of appeal

A from the Federal Court's interlocutory order that the Federal Court had no jurisdiction to add the contractor as a party because he had no sufficient interest in the subject matter of the proceedings. The Federal Court has the same power to add an additional party to an appeal as the High Court has to add a party to an action. This power is conferred by Order 16, rule 11, which is in the same terms as the former Order 16, rule 11, of the English Rules of the Supreme Court. To come within the words of the rule the party to be added must be one "who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter". These words have been the subject of voluminous judicial exegesis and *Amon v. Raphael Tuck & Sons Ltd.*⁽¹⁾ contains a useful collection of citations to Devlin J. of many of the authorities prior to 1956. Devlin J.'s analysis of those authorities led him to reject the view expressed by Lord Esher M.R. in *Byrne v. Brown*⁽²⁾ that the rule ought to be given a wide interpretation so as "to secure that, when a court can see in the transaction brought before it that the rights of one of the parties will or may be so affected that under the forms of law other action may be brought in respect of that transaction, the court shall have power to bring all the parties before it, and determine the rights of all in one proceeding". Devlin J. himself accordingly propounded in *Amon's* case a much narrower interpretation of the rule which it is unnecessary to repeat here for it was over-ruled, in their Lordships' view rightly, by the Court of Appeal in *Gurtner v. Circuit*⁽³⁾ a case decided after the date of the judgment of the Federal Court of Malaysia in the present case.

G The cases illustrate the great variety of circumstances in which it may be sought to join an additional party to an existing action. In their Lordships' view one of the principal objects of the rule is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. To achieve this object calls for a flexibility of approach which makes it undesirable in the present case, in which the facts are unique, to attempt to lay down any general proposition which could be applicable to all cases.

I It has been sometimes said as in *Moser v. Marsden*⁽⁴⁾ and in *In re I.G. Farbenindustrie A.G.*⁽⁵⁾ that a party may be added if his legal interests will be affected by the judgment in the action but not if his commercial interests

only would be affected. While their Lordships agree that the mere fact that a person is likely to be better off financially if a case is decided one way rather than another is not a sufficient ground to entitle him to be added as a party, they do not find the dichotomy between "legal" and "commercial" interests helpful. A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?

In the present case as already pointed out if the appeal is withdrawn or fails the contractor will have no right to enter upon and win the minerals on the disputed parcels. If it succeeds he will have such a right. The interests of the company, the sub-lessees and the sub-sub-lessee in the disputed parcels are the subject matter of the action, and counsel for the company concedes that if the sub-sub-lessee had agreed with the contractor to grant him a sub-sub-lease of the disputed parcels paying tribute at 14½% of the proceeds of sale, instead of agreeing to grant him a licence to enter and win the minerals for her for in return for 85½% of the proceeds of sale, the court would have jurisdiction to add the contractor as a party because the contractor would then have a "legal" interest in the subject matter of the action.

In their Lordships' view the jurisdiction of the Federal Court of Malaysia to add the contractor as a party to the appeal does not turn upon the technical distinction between a leasehold interest and a licence to enter and work the minerals. His interest, in their Lordships' view, is sufficiently direct to give the court jurisdiction to add him as a party.

That being so the matter was one for the discretion of the Federal Court. In other circumstances it might have been argued that the interests of the contractor were sufficiently safeguarded by substituting the sub-lessees for the sub-sub-lessee as appellants and that it was therefore unnecessary to add the contractor as a second appellant. But the Federal Court were entitled to take the view that this would not be a sufficient safeguard. The company had already bought off one appellant. They might try the same tactics with the sub-lessees.

Their Lordships will report to the Head of Malaysia their opinion that this appeal ought to be dismissed and that the appellant ought to pay to the first and second respondents their costs of this appeal.

Appeal dismissed.

Solicitors: *Parker Garrett & Co.; Graham Page & Co.*

**SIM LIM INVESTMENTS LTD. v.
ATTORNEY-GENERAL,
SINGAPORE**

[P.C. (Lord Hodson, Lord Diplock & Sir Garfield Barwick) July 28, 1969]

[Privy Council Appeal No. 34 of 1968]

Income Tax — Statutory income — Dividend — Subsidiary company declaring dividend — Whether parent company entitled to treat dividend declared and paid in subsequent year as having been derived and paid in subsequent year — Accounting practice — Income Tax Ordinance (Cap. 166) ss. 10, 35(7A), 37, 44 sub-ss. (1)–(5).

This was an appeal from the decision of the Federal Court reported in [1969] 1 M.L.J. 5.

The only question in this appeal was whether a dividend of \$1,192,500 declared and paid on March 6, 1965 by Sim Lim Co. Ltd., a wholly-owned subsidiary of the appellant company, was to be included in the statutory income of the appellant company for the year of assessment ended December 31, 1965.

Held, dismissing the appeal: (1) as was held by each of the courts below, the dividend of \$1,192,500 declared and paid to the appellant company on March 6, 1965 formed part of its statutory income for the year of assessment ended December 31, 1966, and did not form part of its statutory income for the year of assessment ended December 31, 1965 in which its own dividend of \$811,162.50 (from which tax was deducted) was paid;

(2) the words of section 35 (7A) are too plain to permit any other construction than those accepted by the High Court of Singapore and the Federal Court of Malaysia. Income from a dividend does not accrue until it has been declared and at least become payable.

PRIVY COUNCIL appeal heard on June 25, 1969.

H.H. Monroe, Q.C. and G. Starforth Hill for the appellants.

Michael Nolan, Q.C., Stewart Bates and Sat Pal Khattar (State Counsel) for the respondent.

Lord Diplock (delivering the judgment of the Board): The only question in this appeal is whether a dividend of \$1,192,500 declared and paid on 6th March 1965 by Sim Lim Co. Ltd., a wholly-owned subsidiary of the appellant company, is to be included in the statutory income of the appellant company for the year of assessment ended 31st December 1965.

The appellant company itself declared and paid on 17th August 1965 a dividend of \$811,162.50 from which it duly deducted tax at the rate of 40% under section 44(1) of the Income Tax Ordinance. Subsections (2) to (5) of section 44 provide in effect that if the amount so deducted exceeds the amount of tax payable by the appellant company in respect of the year of assessment in which the deduction was made (together with any balance of tax from pre-